WEE TIANG KHENG & ORS.

v.

NGUN NII SOON & ORS.

HIGH COURT BORNEO
CHONG SIEW FAI J
[SUIT NO. 154 OF 1985]
12 SEPTEMBER 1988

CIVIL PROCEDURE: *Judgment in default of defence - Application to set aside - Parties to action - Order 77 r. 9 RHC 1980 - Legal person - Donee of power of attorney - Order 15 r. 6(2) RHC 1980 - Removal and addition of parties - Mesne profit - Section 28(4)(a) of the Civil Law Act 1956 - Order 19 r. 9 - To set aside in part.*

This was an application to set aside a judgment in default of defence where the 3 defendants were ordered to give up to the plaintiffs portions of a shophouse and to pay mesne profits at RM5,000 per month from 1 June 1985 till possession is delivered.

The 2nd and 3rd defendant submitted that O. 77 r. 9 did not enable plaintiff to join both the 2nd defendant firm and its proprietor as parties to the action. Further it was contended that the 1st named plaintiff had no reasonable cause of action against the 2nd and 3rd defendant as he was only a donee of a power of attorney and not a registered co-proprietor of the shophouse. Another complaint was that the mesne profits claimed were a great deal more than the open market value or the agreed rent. The plaintiffs said the claim was based on s. 28(4)(a) of the Civil Law Act 1956.

Held:

[1] Even accepting that the claim is one of tenancy and that the 2nd defendant-firm cannot hold a tenancy, there is nothing to prevent the judgment from being enforced against the 3rd defendant who was and is the sole proprietor of the 2nd defendant firm.

[2] A person authorised to sue and suing under a power of attorney on behalf of his principal has to sue in the name of the principal.

[3] The move to remove and or to add parties may be on application or on the Court's own motion but such removal or addition is allowed where the judgment is not given and perfected.

[4] A plaintiff may, claim mesne profits at a rate higher than the rate of the agreed rent. However if he does so or the indorsement of claim does not disclose the amount of the agreed rent, the practice is that judgment in default can only be entered for mesne profits to be assessed. It can be taken as a rule of practice, if not of law that the burden lies on the plaintiff to adduce evidence to establish that the higher rate as claimed is reasonable and ought to be granted.

[Judgment in default as against 2nd and 3rd defendants set aside. Cost of and occassioned by the entry of the judgment and of its setting aside and costs of application be costs in the action.]

Cases referred to:
Madan Lal & Anor. v. Ho Siew Bee [1983] 1 MLJ 105
Jones and Saldanha v. Gurney [1914] WN 72
Abbey Panel Sheet Metal Co. Ltd. v. Barson Products [1947] 2 All ER 809
G.L. Baker Ltd. v. Barclays Bank Ltd. [1956] 3 All ER 519
Southport Tramways Company v. Gandy [1897] 2 QB 66

Legislation referred to:
Civil Law Act 1956, s. 28(4)(a)
Rules of the High Court 1980, O. 15 r. 6(2), O. 19 r. 9, O. 77 r. 9

Other source referred to:
Supreme Court Practice 1985, Vol. 1, para. 13/4/5, 1988, Vol. 1 para. 13/4/5

For the plaintiffs - Chew Peng Hui
For the 2nd & 3rd Defendants - Stephen Chung

JUDGMENT

Chong Siew Fai J:

This is an application by the 2nd and the 3rd defendants to set aside the "judgment in default of defence" dated 7 October 1985 obtained by the plaintiffs against the 1st, 2nd and 3rd defendants. Under the judgment, the 3 defendants were ordered to give up to the plaintiffs certain portions of the shophouse as therein defined (these portions are hereinafter referred to as 'the premises'), to pay the plaintiffs mesne profits at RM9,000 per month from 1 June 1985 till possession is delivered up and costs RM255.

The basis of the plaintiffs' claims as disclosed in the statement of claim is that they are the registered proprietors of the shophouse, that the 1st defendant was their monthly tenant respecting the premises, that the 2nd defendant-firm of which the 3rd defendant is the sole proprietor is the sub-tenant of the 1st defendant, that the tenancy of the 1st defendant having been duly terminated on 30 June 1985 by a notice to quit dated 24 May 1985 and the defendants wrongfully remaining in occupation of the premises, the plaintiffs are entitled to the reliefs as claimed in the action. The plaintiffs did not aver or show what the monthly rental for the tenancy was. Paragraph 7 of their statement of claim, however, alleges: "The monthly rental of the premises is RM4,500". On the other hand, there is more specific assertion by the defendants that the rental was RM206 per month. (See para. 5 of the proposed defence and counterclaim annexed to Stephen Chung's affidavit made on 9 October 1985). The plaintiffs, however, claimed and had accordingly mesne profits at RM9,000 per month entered in the default judgment.

For the 2nd and the 3rd defendants it was firstly submitted that O. 77 r. 9 did not enable the plaintiffs to join both the 2nd defendant firm and its proprietor (3rd defendant) as parties in this action, that in so doing it was oppressive, unfair, embarrassing and prejudicial to the defence and that the 2nd defendant firm not being a legal persona was not capable of holding any tenancy and there was no basis in law to name it as a party to the proceedings. *Madan Lal & Anor. v. Ho Siew Bee* [1983] 1 MLJ 105 was cited in support.

Order 77 r. 9 makes a person carrying on business within the jurisdiction in a name or style other than his own name liable to be sued in that name or style as if it were the name of a firm. It is a permissive provision. It does not restrict the person to be sued only in that name or style. In the instant case it is not disputed that the 3rd defendant Tiong Ai King was and is the sole proprietor of the 2nd defendant-firm. It has not been shown in what way it was oppressive, unfair, embarrassing and prejudicial to Tiong on account of his being

sued in the manner in this action such that the default judgment ought on that account to be set aside. The claim of the plaintiffs against the 2nd and the 3rd defendants is that they are trespassers. Even accepting that the claim is one of tenancy and that the 2nd defendant-firm cannot hold a tenancy, there is nothing to prevent the judgment from being enforced against the 3rd defendant who, as admitted, was and is the sole-proprietor of the 2nd defendant-firm. In *Madan Lal & Anor. v. Ho Siew Bee* [1983] 1 MLJ 105, the situation was different. There the issue was whether the name of a partnership firm is or can be the tenant. More importantly, there the partners of the partnership-firm were not made parties to the proceedings before the Rent Tribunal.

I find no merits in this ground.

Another contention is that the 1st named plaintiff Wee Tiang Kheng not being a registered co-proprietor of the shophouse as alleged in the statement of claim, has no reasonable cause of action against the 2nd and the 3rd defendants and the judgment is therefore bad.

It is not disputed that all material times the 1st- named plaintiff Wee Tiang Kheng was not and is not a registered co-proprietor of the shophouse. He was and is a donee of the power of attorney created by one Julian Wee Lip Jin. On the evidence, Wee Tiang Kheng clearly was and is not a registered co-proprietor of the shophouse as alleged in the statement of claim. In *Jones and Saldanha v. Gurney* [1914] WN 72 an attorney appointed under a power of attorney sued as a co-plaintiff. It was held that the statement of claim showed no cause of action in the attorney and that his name was improperly joined. It appears clear that a person authorised to sue and suing under a power of attorney on behalf of his principal has to sue in the name of the principal. *Jones and Saldanha v. Gurney, supra*.

For the plaintiffs it was contended that even if a party had been wrongly or improperly made a co-plaintiff, he could be removed and the proper party added. Reliance was placed on O. 15 r. 6(2) and the case of *The Duke of Buccleuch* [1892] P. 201. The addition of a party under O. 15 r. 6(2)(b) may be made in order that all matters in dispute may be effectually and completely determined and adjudicated upon. The Court may also add as a party any person between whom and any party to the cause or matter there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the Court's opinion, it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. Furthermore, the move to remove and/or to add parties may be on application or on the Court's own motion. In *The Duke of Buccleuch, supra,* removal and addition of parties were allowed where the judgment was not final in that damages had yet to be assessed. In our instant case, the default judgment, which had been perfected, was, having regard to its terms, a final judgment. No formal or proper application under O. 15 r. 6(2) was made. The relief was suggested on behalf of the plaintiffs in the course of arguing the defendants' present application to set aside the judgment. Having regard to all the facts and circumstances including the point on mesne profits which will be dealt with next, I do not consider it a fair and proper case for the Court on its own motion to exercise the discretion by granting the relief to the plaintiffs as proposed.

Another complaint on the judgment are the mesne profits. Mesne profits are in the nature of damages for trespass. A tenant is liable to pay it if he remains in occupation or otherwise keeps the landlord out of the premises after his tenancy has been lawfully terminated or forfeited. In the case of the 2nd and the 3rd defendants, I would, for the purpose of this application, assume that they are trespassers as pleaded.

As has been pointed out, the plaintiffs in the statement of claim stated: "The monthly rental of the premises is RM4,500". On the evidence, this could not have been the agreed monthly rental between the plaintiffs and the 1st defendant or between the plaintiffs and the 2nd and 3rd defendants who, as pleaded, were the subtenants. A plaintiff may, of course, claim mesne profits at a rate higher than the rate of the agreed rent. However, if he does so or the indorsement of claim does not disclose the amount of the agreed rent, the practice is that judgment in default can only be entered for mesne profits to be assessed. (See *The Supreme Court Practice* 1988 Vol. 1, para. 13/4/5 last sub-paragraph.) In such a case, it can, I think, be taken as a rule of practice, if not of law, that the burden lies on the plaintiff to adduce evidence to establish that the higher rate as claimed is reasonable and ought to be granted. In our instant case, not only that the allegation of RM4,500 per month in the statement of claim was not the agreed rent, the plaintiffs also claimed twice the amount of RM4,500 i.e. RM9,000 per month. Therefore the plaintiffs in effect were claiming as mesne profits a great deal more than what the plaintiffs themselves regarded as the open market value or rack rent which on the evidence already far exceeded the agreed rent.

Counsel for the plaintiffs cited *Abbey Panel Sheet Metal Co. Ltd. v. Barson Products* [1947] 2 All ER 809. That case was in the reverse position. There the claims included a liquidated demand and interlocutory judgment signed as a result of the defendants' failure to appear was held to be good. In our instant case when the writ and statement of claim are examined and tested against the evidence, my view is that the default judgment ought in the interest of justice be set aside.

Next, *G.L. Baker Ltd. v. Barclay Bank Ltd.* [1956] 3 All ER 519 was cited particularly the judgment at p. 521 D-E in support of the arguments that the form of judgment (final or interlocutory) to be entered depended upon the manner the writ was indorsed and that final judgment could be entered if a rate had been stated as damages for mesne profits. In my view *G.L. Baker Ltd., supra* calls for a different consideration. There, there were specific allegations that the sums claimed were "the property of the plaintiffs" or "the plaintiffs' property fraudulently converted" by the defendant.

Reference was also made to two passages in *Southport Tramways Company v. Gandy* [1897] 2 QB 66. I find them to be of no assistance. They relate to the question of the soundness or otherwise of the writ for the purpose of an O. 14 application i.e. whether or not the writ was specially indorsed.

Counsel for the plaintiffs also referred to the 2nd sub-paragraph of para. 13/4/5 in the *Supreme Court Practice* 1985 Vol. 1 and contended that in a claim for mesne profits final judgment in a liquidated sum could be entered. The said 2nd sub-paragraph shows that an important element must be present for the entry of such a judgment i.e. that the mesne profits claimed are at a rate which is the same as the agreed rent of the premises. The claim of RM9,000 per month in the present action was not the agreed rental between the parties.

The plaintiffs further contended that their claim was based on s. 28(4)(a) of the Civil Law Act 1956. Under the said s. 28(4)(a), a landlord may claim against a tenant who holds over after the determination of the tenancy, double the amount of the rent or double the value during the period of detention of the premises so detained. In the instant case, however, the claim of RM9,000 per month is, as stated earlier, not double rent nor has it been pleaded as double value. The argument, therefore, is untenable.

It was urged upon me that should the judgment on mesne profits be held unsustainable, the default judgment may under O. 19 r. 9 be set aside in part. Having regard to the various unsatisfactory features stated above, I am not prepared to do so. I allow the application. The whole judgment in default dated 7 October 1985 in this action so far as affecting the 2nd and the 3rd defendants is hereby set aside.

As regards costs, though the default judgment is for the above reasons, set aside, the 2nd and the 3rd defendants were not entirely without fault in that the time limited for service of defence had expired when the default judgment was entered. In the circumstances, I think it fair and reasonable that the costs of and occasioned by the entry of the judgment and of its setting aside including the costs of this application be costs in the action.

Also found at [1989] 1 CLJ 267